

Lathrop & Gage LLP  
2345 Grand Boulevard, Suite 2200  
Kansas City, Missouri 64108-2618

1 THOMAS G. RYAN (NV Bar No. 9378)  
tryan@lrrlaw.com  
2 HOWARD E. COLE (NV Bar No. 4950)  
hcole@lrrlaw.com  
3 JENNIFER K. HOSTETLER (NV Bar No. 11994)  
jhostetler@lrrlaw.com  
4 LEWIS ROCA ROTHGERBER LLP  
5 3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169  
6 (702) 949-8315 tel  
(702) 949-8379 fax  
7

8 MICHAEL J. ABRAMS  
mabrams@lathropgage.com  
9 LATHROP & GAGE LLP  
10 2345 Grand Boulevard, Suite 2200  
Kansas City, MO 64108  
11 (816) 292-2000 tel  
(816) 292-2001 fax  
12 *Pro Hac Vice Admitted*

13 *Attorneys For Plaintiff*  
14 *IPFS Corporation*

15 **UNITED STATES DISTRICT COURT**

16 **DISTRICT OF NEVADA**

17  
18 IPFS CORPORATION, a Missouri  
Corporation,

19 v.  
20 Plaintiff,

21 v.  
22 LORRAINE CARRILLO, an individual,  
23 Defendant.

Case No. 2:14-cv-00509-GMN-GWF

**PLAINTIFF'S SUGGESTIONS IN  
OPPOSITION TO DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

**Oral Argument Requested (LR 78-2)**

24  
25 Plaintiff IPFS Corporation ("IPFS"), through counsel, respectfully submits these  
26 Suggestions in Opposition to Defendant Lorraine Carrillo's Motion for Summary Judgment.  
27  
28

1           **I. PROCEDURAL BACKGROUND**

2           IPFS moved for partial summary judgment on October 27, 2014 seeking an order that (a)  
 3 finds Carrillo liable for breach of contract on her employment agreement; (b) modifies the  
 4 restrictions to promote fairness; (c) immediately enjoins her from further breach; and (d) reserves  
 5 the issue of damages for trial. IPFS's motion has been fully briefed since December 3, 2014; it is  
 6 still pending. On December 22, 2014, Carrillo submitted her own motion for summary judgment,  
 7 Doc. 60. Notably, however, Carrillo's motion for summary judgment raises no new arguments,  
 8 case law, or evidence not previously advanced in her opposition to IPFS's motion. *Compare*  
 9 Doc. 60 with Doc. 55. Carrillo's motion apparently abandons several of her more unavailing  
 10 arguments,<sup>1</sup> but her remaining arguments fare no better. Because most of the issues are the same,  
 11 only with a slightly different procedural posture, **IPFS incorporates by reference all of its**  
 12 **previously submitted evidence and briefing on IPFS's Motion for Partial Summary**  
 13 **Judgment, Docs. 44 and 57.** This brief will simply highlight IPFS's responses to Carrillo's  
 14 remaining arguments.

15           **II. ARGUMENT**

16           **A. IPFS Presented Overwhelming Evidence that IPFS Has a Protectable Interest in the**  
 17 **Customers Identified on the Restricted List**

18           There is ample evidence within the record to demonstrate that IPFS has a protectable  
 19 interest in its customers, and that the proposed modifications of Carrillo's Agreement are no more  
 20 restrictive than necessary to protect IPFS's interest. (However, even if more evidence was  
 21 needed to modify the Agreement, this would be a fact issue precluding summary judgment in  
 22 favor of Carrillo). Missouri Revised Statute § 431.202.1 confirms that employers, such as IPFS,  
 23

---

24  
 25  
 26           <sup>1</sup> Carrillo previously criticized the evidentiary basis of the Restricted List, claimed that IPFS's business  
 27 growth, her changes in territory, and changes in compensation affected the enforceability of the Agreement. She also  
 28 claimed that the "equities" favored her. These arguments are not raised in Carrillo's affirmative motion. *Compare*  
 Doc. 60 with Doc. 55.

1 have a legally protectable interest in their customer relationships. Decades of Missouri case law  
2 hold that agreements should be enforced as written or modified to protect these relationships.  
3 IPFS asks the Court to enjoin Carrillo with a customer-specific restriction that was approved by  
4 the Missouri Supreme Court in *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 847 (Mo. 2012).  
5 In *Whelan*, the Missouri Supreme Court simply limited the restriction to “those customers with  
6 whom [the former employees] dealt.” *Id.* IPFS used its best efforts to ascertain IPFS’s current  
7 customers with whom Carrillo dealt, identified those customers on a “Restricted List,” and  
8 submitted it with the Complaint. These are IPFS’s current customers in a defined territory for  
9 whom Carrillo was compensated to service, maintain relationships, assist with any problems,  
10 regularly solicit, and for whom she received commissions when the customers facilitated loans  
11 through IPFS. *See, e.g.*, Doc. 44-4; Doc. 44-5; and Doc. 55-4, pp. 6; 10-11. It is certainly  
12 reasonable to restrict Carrillo from soliciting the actual and current customers that IPFS assigned  
13 to her for safekeeping.

14 Carrillo now oddly tries to minimize her role in earning her commissions, essentially  
15 arguing that she did not do the work IPFS paid her to do. However, when pressed at her  
16 deposition and asked, “[are] there any agencies on [the Restricted List] that you did not have  
17 contact with while you were at IPFS in -- in connection with your duties and responsibilities for  
18 IPFS?,” Carrillo identified only 5 out of the 103 listed. *See* Doc. 57-2, Carrillo Dep. at 90:12 –  
19 93:16 (listing JPG Insurance, Century One, O’Keefe, Bodenstein, Bill Mitchell). Although  
20 Carrillo was paid to service these customers and received compensation for their sales, IPFS does  
21 not oppose striking these 5 customers from the Restricted List. Undisputed evidence shows that  
22 Carrillo “dealt” with the other 98 customers on the Restricted List and, therefore, enforcement is  
23 appropriate under *Whelan*.

1        Specifically, Carrillo criticizes the Restricted List because it was compiled by ascertaining  
2        all the customers that were “coded” to Carrillo supposedly without making an “individualized  
3        assessment” of the clients to determine the ““nature, quality, or quantity of contacts.”” SUF, ¶ 11;  
4        Doc. 60, pp. 8-9 (quoting *Cont'l Research Corp. v. Scholz*, 595 S.W.2d 396, 401 (Mo. Ct. App.  
5        1980)). Notably, however, *Continental Research* does not suggest that employers must engage in  
6        such an “assessment” for each customer. Rather, this case simply affirmed a trial court’s refusal  
7        to enforce a restrictive covenant *outside* the limits of a former employee’s sales territory—the  
8        trial court notably upheld the restriction *within* the former employee’s territory. *Id.* It is  
9        reasonable to find that a salesperson has the requisite nature, quality and quantity of contacts with  
10        current customers in her territory to whom she has actually sold.

11        Carrillo cites no Missouri authority requiring an “individualized assessment” for each  
12        customer relationship. Carrillo has identified absolutely no Missouri case law where a court  
13        refused to restrict a salesperson from soliciting actual customers in her own territory, on the  
14        grounds that the salesperson did not have sufficient contact with her assigned customers.  
15        Carrillo’s job was to stay in contact with these active customers. She should not be excused from  
16        her contractual obligations based on vague statements that the Restricted List contains “certain  
17        [unnamed] agencies” that she did not contact during her final 24 months with IPPS, or that she  
18        contacted “certain [unnamed] agencies . . . so infrequently that [she] cannot recall when, why, or  
19        how [she] did so.” Carrillo Decl. ¶¶ 25-26.

20        Carrillo’s reliance on *Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 453-54  
21        (Mo. Ct. App. 1998) is misplaced. In *Easy Returns*, the court reversed summary judgment  
22        because the employer failed to provide evidence of the employee’s “quality, frequency, or  
23        duration” of customer contacts **in 24 states**, wherein the **employer failed to show that it has any**  
24        **customers in those same 24 states.** *Id.* In the present case, customers on the Restricted List are  
25  
26  
27  
28

1 actual and current relationships that Carrillo was paid to contact and service. *Easy Returns*  
2 cannot be used to claim that an employer, or the Court, has to investigate every single customer  
3 relationship to determine the level of potential loyalty. Such loyalty is a secret of the heart, which  
4 is often unknown until the salesperson leaves and the customer follows.  
5

6 Moreover, conducting an “individualized assessment” was impracticable because Carrillo  
7 worked from home and failed to track her activities on IPFS’s Customer Relations Management  
8 system (“CRM”). “[The CRM is] a management system where the sales executives can log all of  
9 their visits to agencies, calls with agencies, we use it to track emails. Anything you know about  
10 the agency can be added in there: If they’re sensitive to rate, their terms, what other finance  
11 companies they might currently be using, technology issues they have, things that we have  
12 offered them. It’s just kind of a recap of everything in the agency where the sales executive can  
13 put it in one spot for everybody to see.” *See Doc. 57-1*, Rachel Yunk Dep. at 36:5-14. However,  
14 after Carrillo’s departure, IPFS learned that Carrillo did not use the CRM to track her contacts  
15 with her customers. *Id.* at 41:1-15. IPFS should not be penalized for not conducting an  
16 “individualized assessment,” when none is required by law, and because Carrillo failed to catalog  
17 her customer contacts on the CRM system, it would have been unreasonable to do so. Following  
18 *Whelan*, IPFS utilized its best efforts to identify the customers with whom Carrillo dealt. This is  
19 sufficient under Missouri law.  
20

21 It is no surprise that Carrillo has not proposed any alternative restrictions—she took her  
22 closest and most recent customer relationships with her to IPFS’s competitor. *See Doc. 44-8.*  
23 Indeed, all of IPFS’s customers that Carrillo has successfully taken to her new employer were  
24 serviced directly by Carrillo in the last few months of her employment with IPFS. *Id.* Even the  
25 most narrow restrictions would result in a finding of Carrillo’s breach of contract. Carrillo’s only  
26 hope is for the Court to completely disregard any of her contractual obligations to IPFS. The  
27  
28

1 proposed restrictions are supported by Missouri law and by undisputed evidence on the record.  
 2 Accordingly, the Court should adopt the Restricted List as the manner to enjoin Carrillo from  
 3 soliciting certain customers in whom IPFS has a protectable interest.

4

5 **B. Public Policy Supports Modifying the Agreement to Protect IPFS from Carrillo's**  
**Injurious Conduct Toward IPFS's Customer Relationships.**

6 An essential term of the Agreement is that Carrillo agreed that she would be restricted  
 7 from unfairly competing against IPFS once she left her employment. IPFS does not seek to  
 8 change this essential term, but rather asks the Court to enforce it in a manner that reflects recent  
 9 developments in Missouri law on "reasonableness" under Missouri Revised Statute § 431.202.1.  
 10 There is nothing untoward about this request. Nevertheless, Carrillo discourages the Court from  
 11 modifying the Agreement by claiming it is against public policy for the Court to "rewrite" the  
 12 terms of an agreement. This argument is directly contradicted by numerous opinions in Missouri  
 13 case law, which hold that a defendant can be liable for breach and restrictions can be fashioned  
 14 without any regard to an employment contract's original wording. *See, e.g., Mid-States Paint &*  
 15 *Chem. Co. v. Herr*, 746 S.W.2d 613, 616 (Mo. Ct. App. 1988); *Orchard Container Corp. v.*  
 16 *Orchard*, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980); *Payroll Advance, Inc. v. Yates*, 270 S.W.3d  
 17 428, 437 (Mo. Ct. App. 2008); *see also R. E. Harrington, Inc. v. Frick*, 428 S.W.2d 945, 951  
 18 (Mo. Ct. App. 1968) ("the courts of this state . . . have decreed enforcement as against a  
 19 defendant whose breach occurred within an area in which restriction would clearly be reasonable,  
 20 even though the terms of the agreement imposed a larger and unreasonable restraint"). Left with  
 21 nothing else, Carrillo relies on inapposite case law from other jurisdictions to impose rules and  
 22 requirements that have been expressly rejected in Missouri.  
 23

24 Public policy, as explained in these Missouri cases, is to protect employers from this exact  
 25 type of injury by fashioning a remedy that is fair for both parties. The modified Agreement  
 26 adequately balances the competing interests of IPFS and Carrillo because it is narrowly tailored to  
 27

1 protect IPFS's legitimate business interests while still permitting Carrillo to earn a living and  
2 further her career. None of Carrillo's arguments are persuasive and, at the very least, disputed  
3 material facts preclude summary judgment in favor of Carrillo.

4 **III. CONCLUSION**

5 For the reasons stated above, IPFS respectfully requests that this Court deny Carrillo's  
6 Motion for Summary Judgment, grant IPFS's Motion for Partial Summary Judgment on the issue  
7 of Carrillo's liability for breach of her Agreement, and order immediate injunctive relief  
8 enforcing the Agreement, as modified by IPFS's request. Specifically, IPFS seeks a judgment  
9 and injunction that Carrillo shall not sell to any of IPFS's clients identified on the Restricted List  
10 until June 3, 2015, and for such other and proper relief as it deems just and equitable.

11  
12 Dated this 15<sup>th</sup> day of January, 2015.

13  
14  
15 LATHROP & GAGE LLP

16  
17 By: /s/ Michael J. Abrams  
18 Michael J. Abrams  
19 2345 Grand Boulevard, Suite 2200  
20 Kansas City, Missouri 64108  
Telephone: 816.292.2000  
Facsimile: 816.292.2001

21 and

22 Thomas G. Ryan  
23 Howard E. Cole  
24 Jennifer K. Hostetler  
25 LEWIS ROCA ROTHGERBER LLP  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169

26 *Attorneys for Plaintiff IPFS Corporation*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she caused a copy of the foregoing pleading to be filed and served on the 15th day of January 2015, upon the following counsel of record via the Court's electronic filing system:

Timothy R. Mulliner  
Matthew D. Lamb  
Ballard Spahr LLP  
100 North City Parkway, Suite 1750  
Las Vegas, Nevada 89106  
Telephone: (702) 471-7000  
Facsimile: (702) 471-7070  
[MullinerT@ballardspahr.com](mailto:MullinerT@ballardspahr.com)  
[LambM@ballardspahr.com](mailto:LambM@ballardspahr.com)

John G. Kerkorian  
Ballard Spahr LLP  
1 East Washington Street, Suite 2300  
Phoenix, Arizona 85004-2555  
Telephone: (602) 798-5400  
Facsimile: (602) 798-5595  
KerkorianJ@ballardspahr.com

*Attorneys for Defendant Lorraine Carrillo*

/s/ Jan Ruggles  
An employee of Lathrop & Gage LLP